Filed 11/27/12 P. v. Gray CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM GRAY, Defendant and Appellant.	D059196 (Super. Ct. No. RIF144540)

APPEAL from a judgment of the Superior Court of Riverside County, Robert E. Law, Judge. (Retired judge of the Central Orange Mun. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified with directions.

A jury convicted William Gray of three counts of committing lewd acts upon a child under the age of 14 (Pen. Code,[1] § 288, subd. (a); counts 1, 9, & 10); inducing a minor to engage in sexual conduct for a photograph (§ 311.4, subd. (c), count 2); committing a lewd act by force on a child under the age of 14 (§ 288, subd. (b); count 3);

1 Statutory references are to the Penal Code unless otherwise specified.

misdemeanor false imprisonment (§ 236, count 4); misdemeanor annoying or molesting a child (§ 647.6, subd. (a); count 6); possession of child pornography (§ 311.11, subd. (a); count 7); and attempting a lewd and lascivious act upon a child under the age of 14 (§§ 664/288, subd. (a), count 8).[2]

The court subsequently found true a section 667.61, subdivision (e)(5)[3] allegation that Gray had committed the offenses against more than one victim. The court then sentenced Gray to prison for an indeterminate term of 45 years to life plus a determinate term of four years and four months. The sentence consisted of three consecutive terms of 15 years to life for counts 1, 3, and 9; a consecutive eight-month term for count 2 (one-third the midterm); a consecutive eight-month term for count 7 (one-third the midterm); a one-year consecutive term for count 8 (one-third the midterm); two consecutive years for count 10 (one-third the midterm); a concurrent 365 day jail term for count 4; and a concurrent 365-day jail term for count 6.

Gray appeals, contending substantial evidence does not support the jury's verdict for counts 2, 3, and 4. He also claims the court erred in failing to stay the sentences on counts 2 and 4 under section 654. Except for determining Gray's sentence under count 4 should have been stayed under section 654, we otherwise affirm the judgment.

---

2 Gray also was charged with two counts of committing a lewd and lascivious act upon a child under the age of 14 in violation of section 288, subdivision (a) (counts 5 & 11), but the jury was deadlocked on those counts.

3 This section and subdivision has since been renumbered to section 667.61, subdivision (e)(4). (Stats. 2010, ch. 219, § 16.)

FACTS

We provide only a summary of the evidence presented at trial relating to counts 1 through 4. Our summary is intended to provide a sufficient background for consideration of Gray's claims on appeal, rather than to provide an exhaustive list of all of the evidence presented at trial as to all counts. Accordingly, we omit any discussion of the evidence offered to prove counts 6 through 10 or any evidence of other sexual offenses offered per Evidence Code section 1108.

Counts 1 and 2 (§§ 288, subd. (a) & 311.4, subd. (c)): M.G.

On May 22, 2008, Gray visited his brother, D.G., at D.G.'s house. M.G., D.G.'s eight-year-old daughter, was watching television in the living room with Gray during the visit. While alone with M.G. in the living room, Gray began taking photographs of her. He instructed her to lift up her blouse and took her photograph. M.G. was uncomfortable and did not want Gray to see her chest. She tried to cover her chest with her hand, but Gray pushed it away.

Gray took multiple photographs of M.G. In one, M.G. pulled up her blouse and the photograph is taken from behind her with her buttocks lifted up as she rests on her knees and lies forward on her shoulders. In another, M.G. is lying on her back with her blouse pulled up and her nipples exposed and her legs are somewhat spread. The photograph is taken from the front of her. In another, M.G. is on her hands and knees, looking back at the camera. The orientation of the photograph is from behind M.G. In the fourth photograph, M.G. is in a similar position as the first photograph, except the photograph is predominately of M.G.'s buttocks. In all four photographs, M.G. appears

to be smiling at the camera and is clothed in pants and a blouse. Her blouse, however, is pulled up in three of the four pictures.

D.G. returned to the living room to find M.G. on the floor on all fours and Gray holding up M.G.'s shirt taking a picture. Gray slowly lowered his camera. D.G. did not do anything, but thought the incident was strange.

M.G. told her parents that Gray made her lift her blouse and took pictures of her. M.G. told them she tried to cover her chest and Gray moved her hand away. She also told her parents that Gray tickled her and put his hand down her pants. While it is not clear if M.G. told her parents where she was tickled, at trial M.G. testified that Gray had tickled her "rear end." M.G.'s mother reported the incident to the police.

Counts 3 and 4 (§§ 288, subd. (b)(1) & 236): M.C.

M.C., D.G.'s niece, went to D.G.'s house for Thanksgiving dinner when she was seven years old. Gray also was there. At some point that night, Gray and M.C. were in a bedroom, and Gray asked M.C. to come over to see him. She complied, and then Gray picked her up and put her on his lap. While M.C. was sitting on his lap, Gray kissed her on the mouth. M.C. was very uncomfortable and tried to get off Gray's lap. Gray told M.C. not to tell her parents what he had done. Gray's instruction scared M.C.

After M.C. was able to get off Gray's lap, Gray grabbed her hand and "pulled" her to a more secluded area of the room, near the closet. He grabbed her under her arms and laid her down on the ground on her back. Gray kneeled down at M.C.'s feet and bent over her. He then grabbed the bottom of her shorts and pulled them down to the middle of her thighs, exposing her underwear. M.C. kicked Gray. M.C.'s brother and cousin

walked over and Gray let go. Gray picked M.C. up from the floor, and M.C. pulled up her shorts. Gray then grabbed her hand and started to walk, but M.C. pulled her hand away and left the room.

M.C. did not initially tell her parents what Gray had done because she was scared of what Gray would do if she told them. On another occasion after Thanksgiving, Gray put his hand on M.C.'s hip and squeezed it, making M.C. very uncomfortable.

M.G.'s mother called M.C.'s father and told him about the incident between M.G. and Gray. After being prodded by her parents, M.C. told her parents what Gray had done to her.

M.C. was subsequently interviewed by child protective services. M.C. told the interviewer that on Thanksgiving, Gray tried to kiss her on the mouth and tried to pull down her shorts. M.C. also told the interviewer that Gray sometimes put his hand on her leg when she was wearing skirts and would squeeze her leg.

Defense

Officer Liam Doyle testified that he responded to the report made by M.G. against Gray. M.G. did not say that Gray had tickled her or inappropriately touched her. D.G. told Doyle that he did not see anything inappropriate happen between M.G. and Gray.

During M.G.'s forensic interview, M.G. did not say that Gray had tickled her or inappropriately touched her.

DISCUSSION

I

SUBSTANTIAL EVIDENCE SUPPORTS GRAY'S CONVICTIONS UNDER COUNTS 2, 3, AND 4

A. Standard of Review

When considering a defendant's challenge to the sufficiency of the evidence, we review the entire record most favorably to the judgment to determine whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. We do not reweigh evidence or reassess a witness's credibility and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

B. Count 2

The jury convicted Gray under count 2 for inducing a minor to engage in sexual conduct for a photograph (§ 311.4, subd. (c)). Gray contends there is insufficient evidence to support the conviction under count 2 because the photographs of M.C. do not depict sexual conduct. We disagree.

Section 311.4, subdivision (c) provides in relevant part:

> "Every person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs,

> uses, persuades, induces, or coerces a minor under the age of 18 years . . . to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any . . . image, including, but not limited to, any . . . photograph . . . that contains or incorporates in any manner, any film, filmstrip, or a live performance involving, sexual conduct by a minor under the age of 18 years . . . is guilty of a felony."

Section 311.4, subdivision (d)(1) defines "sexual conduct" as:

> "[A]ny of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct."

In *People v. Kongs* (1994) 30 Cal.App.4th 1741 (*Kongs*), the court provided a list of factors to consider in determining whether an image is intended to stimulate a viewer by emphasizing a child's genitals, pubic, or rectal area:

> "1) whether the focal point is on the child's genitalia or pubic area; [¶] 2) whether the setting is sexually suggestive, i.e ., in a place or pose generally associated with sexual activity; [¶] 3) whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child; [¶] 4) whether the child is fully or partially clothed, or nude; [¶] 5) whether the child's conduct suggests sexual coyness or a willingness to engage in sexual activity; [¶] 6) whether the conduct is intended or designed to elicit a sexual response in the viewer." (*Id*. at p. 1755, citing *United States v. Dost* (S.D. Cal. 1986) 636 F. Supp. 828, 832 (*Dost*), affd. sub nom. *U.S. v. Wiegand* (9th Cir. 1987) 812 F.2d 1239.)

The court also noted, "With the exception of factor No. 6, which is a required element of a Penal Code section 311. 4 violation, a trier of fact need not find that all of

the first five factors are present to conclude that there was a prohibited exhibition of the genitals or pubic or rectal area: the determination must be made based on the overall content of the visual depiction and the context of the child's conduct, taking into account the child's age." (*Kongs*, *supra*, 30 Cal.App. 4th at p. 1755.)

Other courts also have emphasized that "consideration of the specific *Dost* factors is not mandatory under section 311.4," and that in considering a sufficiency challenge in this context, a reviewing court must determine, " 'based on the overall content of the visual depiction and the context of the child's conduct, taking into account the child's age' [citation], that the photograph depicts an exhibition of the genitals for the purpose of sexual stimulation of the viewer. [Citation.]" (*People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1133.) The court in *Spurlock* also stated that in determining whether particular images constitute evidence of a section 311.4 violation, "[n]udity is not sufficient, but it is also not strictly necessary." (*Spurlock, supra*, at p. 1129.) "Whether a particular display is an illicit exhibition is a more complicated inquiry than simply asking whether the genitals are exposed. Photographs showing a partially clad pubic area may well be intended to elicit a sexual response on the part of the viewer." (*Ibid*.)

Against this legal backdrop, we conclude the four photographs constitute substantial evidence supporting Gray's conviction under count 2. One of the pictures shows M.G. lying on her back on the floor with her legs spread and her blouse lifted, exposing her chest. We determine this pose is sexual in nature and is not natural for a child of M.G.'s age. In addition, multiple pictures have M.G. on her hands and knees or on her stomach with her buttocks lifted in the air with the orientation of the photograph

from behind M.G. These pictures are extremely sexually suggestive. Although M.G. is mostly clothed, her pose is something that would more likely be found in a pornographic magazine then a family photo album. Indeed, one photograph entirely focuses on M.G.'s buttocks.

Despite the nature of these photographs, Gray argues they are not sexual in nature because they do not depict masturbation, bestiality, sexual sadism, sexual masochism, or penetration of the vagina or rectum. Gray claims the photographs do not show M.G. engaged in sexual conduct because they do not involve M.G. in actual or simulated sexual intercourse, oral copulation, or anal intercourse. He also asserts the photographs do not show the genitals, rectal area, or excretory functions performed in a lewd or lascivious manner. We are not persuaded.

Gray's arguments ignore the overall content and context of the photographs. M.G. was only eight years old at the time. Gray had her pose in certain positions and required her to lift her blouse. These poses were sexually provocative, and Gray orchestrated them. Substantial evidence thus supports the jury's finding that Gray violated section 311.4.

C. Count 3

Gray contends that sufficient evidence did not support his conviction under count 3 that he committed the lewd acts with force under section 288, subdivision (b), but instead, committed the lewd acts without substantially greater force than that inherent in the lewd acts themselves. We disagree.

The elements of an offense under section 288, subdivision (b) are: (1) physical touching of a child under age 14; (2) for the present and immediate purpose of sexually arousing or gratifying the defendant or the victim; and (3) the touching was accomplished by use of force, violence, duress, menace, or fear of injury. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171.) Force, in this context, means physical force that is " 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' " (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.)

Citing *People v. Schulz* (1992) 2 Cal.App.4th 999 (*Schulz*) and *People v. Senior* (1992) 3 Cal.App.4th 765 (*Senior*), Gray insists the evidence was insufficient to prove he used force within the meaning of section 288, subdivision (b). However, Gray's reliance on these cases is misplaced. Neither *Senior* nor *Schulz* is instructive here.

In *Schulz*, the Sixth District concluded, in dicta, the defendant's grabbing of the victim's arm and holding her while fondling her was not sufficient force under section 288, subdivision (b). (*Schulz, supra,* 2 Cal.App.4th at p. 1004.) The court reasoned, "[s]ince ordinary lewd touching often involves some additional physical contact, a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.' " (*Ibid*.)

In *Senior*, the defendant orally copulated the victim's vagina and made the victim orally copulate his penis. The victim testified that when "she tried to pull away when he [the defendant] licked her vagina. He pulled her back. She tried to pull away from sucking his penis. He held her shoulders." (*Senior, supra,* 3 Cal.App. 4th at p. 771.) Relying on its interpretation of force as set forth in *Schulz, supra,* 2 Cal.App.4th 999, the

Sixth District concluded that it did "not regard as constituting 'force' the evidence that defendant pulled the victim back when she tried to pull away from the oral copulations," finding significant the fact that "[t]here was no evidence here of any struggle, however brief." (*Senior, supra,* at p. 774.)

However, the Sixth District and other Courts of Appeal have rejected this analysis in *Schulz, supra,* 2 Cal.App.4th 999 and *Senior, supra,* 3 Cal.App.4th 765. (See *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004 (*Alvarez*) [rejecting *Schulz* only]; *People v. Bolander* (1994) 23 Cal.App.4th 155, 160-161 (*Bolander*) [Sixth Dist.]; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1790; *People v. Babcock* (1993) 14 Cal.App.4th 383, 388.) We agree with this line of cases and also reject both *Schulz, supra,* 2 Cal.App.4th 999 and *Senior, supra,* 3 Cal.App.4th 765 on this issue.

Evidence of force is sufficient in this case as to M.C. For example, Gray grabbed M.C. under her arms and pulled her onto his lap as he was sitting on the bed. He then kissed her on the mouth. After she got off his lap, he grabbed her hand and pulled her over to a more secluded part of the bedroom, near the closet. There he picked M.C. up and put her down on the floor on her back. He then knelt down over her and pulled her shorts down. During this time, M.C. was kicking Gray trying to get him to stop. After M.C.'s brother and cousin came into the room and Gray allowed M.C. to get up, he attempted to grab her yet again.

Accordingly, we determine sufficient evidence of force supports the jury's finding. (See, e.g., *Alvarez, supra,* 178 Cal.App.4th at p. 1005 [defendant's resistance of victim's attempts to push him away and holding the victim "hard" and "tight" sufficient evidence

of force]; *Bolander*, *supra*, 23 Cal.App.4th at pp. 160-161 ["defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim's waist towards him" constituted forcible lewd conduct].)

Because we determine substantial evidence of force exists to satisfy the requirements of section 288, subdivision (b), we need not address Gray's assertion there was insufficient evidence of duress to support his conviction under count 3.

D. Count 4

Gray next argues sufficient evidence does not support his conviction for misdemeanor false imprisonment for count 4. We reject his argument.

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) "Any exercise of express or implied force which compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment." (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1123 (*Bamba*), citing *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717.) False imprisonment is a misdemeanor unless it is "effected by violence, menace, fraud, or deceit," in which case it is a felony. (§ 237.)

Here, we find abundant evidence supporting Gray's conviction for misdemeanor false imprisonment. Gray grabbed M.C. and pulled her to a more secluded area of the bedroom. He picked her up and put her down on the ground. M.C. was kicking at Gray, but Gray did not let M.C. up until other people walked into the bedroom. A jury could reasonably conclude from this evidence that Gray restricted M.C.'s "personal liberty."

II

SECTION 654

Gray asserts that his sentences for count 2 and count 4 should be stayed under section 654. We agree with Gray that the court should have stayed his sentence on count 4.

A. The Law

In general, section 654[4] prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Whether a course of conduct is indivisible depends on the intent and objective of the actor. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334; see also *People v. Latimer* (1993) 5 Cal.4th 1203.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Even though our Supreme Court has in the past criticized this test, it has more recently reaffirmed it as the established law of this state. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) In so doing, the court noted "that cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment

---

4 Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

was permitted. [Citation.]" (*Ibid*.) In other words, "if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]' [Citations.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

The issue of whether section 654 precludes punishment in any case "is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1143.)

B. Sentence For Count 2

Gray was convicted of committing lewd and lascivious acts on M.G. in count 1 and inducing M.G. to engage in sexual conduct for a photograph in count 2. The court sentenced Gray to prison for 15 years to life for count 1, and a consecutive term of eight months for count 2. Gray argues the touching alleged in count 1 was the same as the conduct used to convict him under count 2. Thus, the two counts actually had one objective and section 654 prohibits the court from sentencing Gray under both counts.

Gray's argument requires us to conclude that the only act supporting his conviction under count 1 is his lifting of M.G.'s blouse to take the photograph. However, Gray's

contention ignores other evidence introduced at trial. M.G. testified that Gray tickled her "rear end" and grabbed her thigh and put his hand down her pants. These acts are sufficient to support the jury's finding that Gray was guilty under count 1 and are consistent with what the prosecutor argued during his closing argument. As such, different acts and different intents support Gray's convictions under counts 1 and 2. We therefore are satisfied that substantial evidence supports the court's finding that section 654 did not require it to stay Gray's sentence under count 2.

C. Sentence For Count 4

Gray was convicted of committing a lewd act by force on a child under the age of 14 (§ 288, subd. (b)) in count 3. The court sentenced Grey to prison for 15 years to life for count 3. Gray also was convicted of misdemeanor false imprisonment in count 4. The court sentenced him to jail for 365 days. Gray contends the court should have stayed his sentence under count 4 because he committed the false imprisonment to achieve the objective of committing a lewd act. In other words, both the false imprisonment and the lewd act were incident to one objective and double punishment is prohibited. The Attorney General counters that the jury could have found Gray's kiss of M.C. was the lewd act and Gray's pulling of M.C.'s arm to move her to a more secluded area of the room, constituting the false imprisonment, occurred later.

Unlike count 1 where the prosecutor argued multiple acts by Gray could satisfy the elements of the crime, for count 3, the prosecutor focused entirely on Gray's conduct after he pulled M.C. to a more secluded area of the room:

> "The first element of Count 3 against [M.C.], did he willfully touch any part of her body, willfully, again, means on purpose. Touching can be through the bare – on the bare skin or through the clothing. What was the touching that we're specifically referring to in Count 3? It's the laying her down on the ground and pulling her pants down as she kicked to get away from the defendant. That touching constitutes any type of touching under lewd and lascivious act."

The act that the prosecutor argued constituted the lewd act for count 3 only occurred after Gray pulled M.C.'s arm to move her to another part of the room. In addition, the prosecutor claimed the same acts (grabbing M.C., leading her to another part of the room, laying her on the floor, and pulling down her pants) also constituted false imprisonment. We therefore conclude that the false imprisonment committed by Gray was the means of committing the lewd act. The false imprisonment allowed Gray to fulfill his objective: the touching of M.C. Put differently, Gray's course of conduct constituted an indivisible transaction in which the false imprisonment of M.C. was incident to the committing of the lewd act. (See *People v. Latimer, supra,* 5 Cal.4th 1203, 1216-1217; *People v. Galvan* (1986) 187 Cal.App.3d 1205, 1218-1219.)

We therefore conclude the trial court erred by imposing a sentence for both committing a lewd act by force (count 3) and false imprisonment (count 4). Because misdemeanor false imprisonment prescribes a lesser sentence than committing a lewd act by force on a child under 14 years of age, section 654 prohibited imposition of sentence on count 4.

DISPOSITION

The judgment is modified to stay Gray's 365-day jail sentence for count 4 (misdemeanor false imprisonment) per section 654. The court is directed to amend the

abstract of judgment to reflect modification and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.